

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION TWO

---

In re the Detention of:

A.N.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR PIERCE  
COUNTY

---

BRIEF OF APPELLANT

---

KAYA MCRUER  
APR 9 Legal Intern (ID# 9894020)

KATE L. BENWARD  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711  
katebenward@washapp.org  
wapofficemail@washapp.org

## TABLE OF CONTENTS

A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	2
C. ISSUES.....	2
D. STATEMENT OF THE CASE.....	5
1. A.N. grew up under a repressive foreign government and believes he must protest corruption. ....	5
2. The government did not argue or seek to prove that A.N. posed a risk of harm to others. ....	7
3. Trial testimony established A.N.'s ability to provide for his essential needs. ....	10
4. The jury found A.N. gravely disabled, but the basis for the verdict remains unclear. ....	14
5. A commissioner ordered A.N. forcibly medicated without considering potentially fatal side effects. ....	15
E. ARGUMENT .....	19
1. The government did not sufficiently prove that A.N. was gravely disabled.....	19
a. The government did not prove A.N. would be unable to provide for his "essential needs." .....	23

b. The government did not sufficiently prove A.N. would not receive care essential to his health or safety if released to the community....	28
i. The government failed to show a high probability that A.M.’s release would result in serious physical harm.....	30
ii. The government did not sufficiently prove commitment at Western State Hospital was essential to prevent serious physical harm. ....	32
c. The commitment order should be reversed for insufficient evidence. ....	33
2. Not requiring the jury to agree on the basis for finding A.N. gravely disabled violated A.N.’s procedural due process rights.....	33
a. The massive liberty interest impacted by involuntary commitment creates a need for additional due process protections. ....	36
b. Not providing a <i>Petrich</i> -like instruction or special verdict form violated A.N.’s procedural due process rights. ....	40
3. The commissioner did not make the substantive “substituted judgment” required to medicate A.N. involuntarily. ....	42
a. A.N. had a due process right to a “medical appropriateness” finding .....	44

b. The commissioner’s substituted judgment finding was inadequate. ....	52
ii. A substituted judgment requires the court to give informed consent on behalf of a person being involuntarily medicated. ....	57
iii. Substituted informed consent protects against excessive deference to the party filing to detain a person. ....	58
c. This Court should reverse the order to force- medicate A.N. ....	59
F. CONCLUSION.....	60

## TABLE OF AUTHORITIES

### **Cases**

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).....	36, 39, 41
<i>Cole v. Arkansas</i> , 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).....	22
<i>Humphrey v. Cady</i> , 405 U.S. 504, 92 S. Ct. 1048, 1052, 31 L. Ed. 2d 394 (1972) .....	35
<i>In re Det. of A.F.</i> , 20 Wn. App. 2d 115, 498 P.3d 1006 (2021).....	28
<i>In re Det. of Cross</i> , 99 Wn.2d 373, 662 P.2d 828 (1983) .....	22
<i>In re Det. of D.W.</i> , 6 Wn. App. 2d 751, 431 P.3d 1035 (2018).....	31
<i>In re Det. of Halgren</i> , 156 Wn.2d 795, 132 P.3d 714 (2006).....	42
<i>In re Det. of Harris</i> , 98 Wn.2d 276, 654 P.2d 109 (1982) .....	passim
<i>In re Det. of L.K.</i> , 14 Wn. App. 2d 542, 471 P.3d 975 (2020).....	passim
<i>In re Det. of LaBelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986).....	passim
<i>In re Det. of McLaughlin</i> , 100 Wn.2d 832, 676 P.2d 444 (1984).....	passim

<i>In re Det. of R.H.</i> , 178 Wn. App 941, 316 P.3d 535 (2014).....	26
<i>In re Det. of Schuoler</i> , 106 Wn.2d 500, 723 P.2d 1103 (1986).....	passim
<i>In re Det. of Swanson</i> , 115 Wn.2d 21, 804 P.2d 1 (1990) .....	20
<i>In re Guardianship of Ingram</i> , 102 Wn.2d 827, 689 P.2d 1363 (1984).....	53, 55, 56, 57
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	38
<i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) .....	30
<i>Riggins v. Nevada</i> , 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) .....	43, 45, 46, 49
<i>Sell v. U.S.</i> , 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003) .....	47
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014) ..	36, 40
<i>State v. Lyons</i> , 199 Wn. App. 235, 399 P.3d 557 (2017) .....	49, 50
<i>State v. Mosteller</i> , 162 Wn. App. 418, 254 P.3d 201 (2011).....	49, 50
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	41, 42
<i>State v. Workman</i> , 66 Wash. 292, 119 P. 751 (1911)...	42

*Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028,  
108 L. Ed. 2d 178 (1990)..... passim

## **Statutes**

RCW 4.44.380 .....35, 37, 42  
RCW 71.05.010(1).....20, 22, 40  
RCW 71.05.010(3)..... 40  
RCW 71.05.020(24).....15, 23, 30, 31  
RCW 71.05.215 .....43, 44, 53  
RCW 71.05.217(1)(j) ..... passim  
RCW 71.05.310 .....21, 23, 39  
RCW 71.05.320(4).....8, 21

## **Other Authorities**

Daniel Bergner, *Doctors Gave Her Antipsychotics. She  
Decided to Live with Her Voices*, N.Y. TIMES, May 17,  
2022 ..... 54  
Dora W. Klein, *Unreasonable: Involuntary Medications,  
Incompetent Criminal Defendants, and the Fourth  
Amendment*, 46 San Diego L. Rev. 161 (2009)..... 54  
Fadi T. Khasawneh & Gollapudi S. Shankar,  
*Minimizing Cardiovascular Adverse Effects of  
Atypical Antipsychotic Drugs in Patients with  
Schizophrenia*, Cardiology Research and Practice  
(2014).....48, 49, 52

Giuseppe Marano et al., <i>Cardiological Side Effects of Psychotropic Drugs</i> , 8(4) J. of Geriatric Cardiology 243 (2011).....	49, 52
James Kachmar, <i>Silencing the Minority: Permitting NonUnanimous Jury Verdicts in Criminal Trials</i> , 28 Pac. L.J. 273 (1996) .....	36, 40
Matisyahu Shulman et al., <i>Managing Cardiovascular Disease Risk in Patients Treated with Antipsychotics</i> , J. of Multidisciplinary Healthcare 489 (2014) ....	48, 52

## **Rules**

CR 43(k).....	10
CR 49(l).....	35, 42
RAP 2.5(a) .....	37
WPI 1.01 .....	10

## A. INTRODUCTION

After escaping a Vietnamese concentration camp, A.N. graduated college, found work, a place to live, and supported himself in the United States. Despite no evidence he was unable to provide for his own physical wellbeing, the government deprived A.N. of his freedom based on unrelated speculation that he might violate a no-contact order and end up in jail if not committed to Western State.

Due process entitled A.N. to protection against the government's unconstitutional detention of him for having a mental illness. By forcibly medicating A.N. without weighing the risk of severe, possibly fatal, side effects given his heart conditions, the commissioner also violated A.N.'s statutory and due process rights.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering a 180-day commitment order absent sufficient evidence of grave disability.

2. The trial court violated A.N.'s due process rights by not requiring the jury to agree on which prong of "grave disability" supported its verdict.

3. At the involuntary medication hearing, the commissioner erred by not adequately considering A.N.'s rational concerns as required by statute and the Due Process Clause.

## C. ISSUES

1. Mental illness alone is not a constitutional basis for involuntary commitment. When seeking involuntary commitment based on "grave disability," the government must prove a person's mental illness creates a significant risk to their "health or safety."

The government's evidence of grave disability was the mere speculation that if released, A.N. may return to jail for violating a no-contact order. That evidence was insufficient to support involuntary commitment.

2. The legislature defines grave disability in two ways. Prong (a) requires proof a person is in "danger of serious physical harm" from passive failure or inability to provide for their essential needs. Prong (b) requires evidence of decompensation that creates a risk to that person's health or safety, and evidence that detention is essential to protect their health or safety. The government must prove each element by clear, cogent, and convincing evidence, and ten out of twelve jury members must agree the State met its burden on a single prong.

Here, the verdict form asked the jury to decide whether A.N. was gravely disabled without

distinguishing the two prongs or requiring ten of the twelve jurors to agree on the basis for commitment. Not requiring the jury to reach a verdict based on the same prong violated A.N.'s procedural due process rights.

3. The Involuntary Treatment Act allows a court to forcibly medicate a person who the court finds is incompetent to make treatment decisions, and only if the court makes a "substituted judgment" finding. This finding must assess whether, if competent, the person would accept treatment. A.N. has multiple heart conditions that create a risk of severe or even fatal side effects from antipsychotic drugs. His resistance to taking the drugs was due to his worries about how they would affect his physical health. The commissioner did not substantively consider A.N.'s rational concerns about health risks in its "substituted judgment" finding

in violation of A.N.'s statutory and procedural due process rights.

#### D. STATEMENT OF THE CASE

**1. A.N. grew up under a repressive foreign government and believes he must protest corruption.**

Growing up in Vietnam, A.N. experienced government corruption and oppression. CP 61. In college, the Vietnamese government detained him in a concentration camp. CP 61. Despite this, A.N. was still able to complete college after his release. CP 61. After graduating, he married, had two children, and worked as a teacher, in manufacturing, and as a business owner. CP 61. After his marriage ended, his father sponsored him to come to the United States. CP 61.

Since immigrating, A.N. has worked as a Boeing subcontractor and at a factory. CP 61. He has many family members in the U.S. and lived with a relative

until his commitment. Ryder RP 123.<sup>1</sup> He has no issues with memory or orientation and is generally pleasant and even-tempered. Ryder RP 45, 138-39. A Western State Hospital psychologist described him at trial as “a man of honor.” Ryder RP 129.

A.N. believes strongly in his duty to combat government corruption and injustice. Ryder RP 53-54. He is intelligent and wants to spread awareness of issues within various parts of the legal system. Ryder RP 132; 159. He often discusses the corruption and injustice he sees in the policing, political, and judicial systems. Ryder RP 56, 87, 158-59. He seeks to raise awareness through legal challenges and protests. Ryder RP 56, 87, 143, 159.

---

<sup>1</sup> Record of proceedings cited by court reporter name and page number.

The government argued that A.N.'s hope to expose corrupt systems from inside jail required his ongoing involuntary commitment. Ryder RP 48-50, 88, 161. A.N. believed his girlfriend was assisting in his protest efforts by enforcing a no-contact order that caused him to go to jail when he brought her flowers. Ryder RP 88, 161. A witness for the hospital testified they believed this was a delusion. Ryder RP 88.

Based on these perceived delusions, the government sought to involuntarily commit A.N. for 180 days, arguing he was gravely disabled. CP 60-61.

**2. The government did not argue or seek to prove that A.N. posed a risk of harm to others.**

The Involuntary Treatment Act provides various reasons to involuntarily commit a person, including if they pose a “likelihood of serious harm” to others. RCW 71.05.320(4). But the government did not argue that

A.N.'s plan to call or bring flowers to his girlfriend rose to the level of a danger to others. Ryder RP 49, 57, 135. Instead, the government argued A.N. should be involuntarily committed based on "grave disability." Adebayo RP 5; CP 57-58.

The government's witnesses testified that A.N.'s health and safety were at risk, based on speculation about what would happen if he brought flowers to his girlfriend. Ryder RP 49. Psychiatrist Mary Zesiewicz specifically argued detention in jail posed a risk to A.N.'s health or safety. Ryder RP 48-50. She worried A.N. would be "at risk" in jail "where there is a lot of COVID," and because of his age and medical conditions. Ryder RP 49. She acknowledged that other people in jail were A.N.'s age but described jail as "not a safe place for anybody." Ryder RP 49-50.

Psychologist Elwyn Hulse raised similar concerns but explained they related to “danger to others”—a basis for commitment not raised by the government—rather than “danger to self.” Ryder RP 122, 143. When pressed, Dr. Hulse made a conclusory statement that violating a no-contact order “could be” a danger to A.N. Ryder RP 122. Dr. Hulse added it “would be detrimental to community safety.” Ryder RP 122. Later, when asked why A.N. needed to be detained at Western State Hospital, Dr. Hulse stated, “safety . . . community safety.” Ryder RP 130.

During the trial, nearly two-thirds of the jury’s proposed questions for witnesses focused on A.N.’s girlfriend, the no-contact order, and the safety of others.<sup>2</sup> Ryder RP 59, 145-48, 162, 164; CP 93-104.

---

<sup>2</sup> In civil cases, jurors may propose written questions for witnesses to clarify testimony. Counsel has an opportunity to object to questions outside the presence

Jurors asked about the purpose of the order, who the woman was, and whether A.N. would violate the order.<sup>3</sup> CP 94, 96, 98, 99, 102, 103; 104; Ryder RP 145, 147, 164. The jury asked no question about A.N.'s health or safety or whether he could provide for his essential needs.

**3. Trial testimony established A.N.'s ability to provide for his essential needs.**

Both hospital witnesses suggested A.N. would not provide for his needs upon release based on his use of the hospital's facilities and services to meet those needs while involuntarily detained. Dr. Zesiewicz suggested A.N. relied on the hospital for his needs due

---

of the jury. The judge may then read a question to the witness as written, rephrase the question, or refuse to allow the question. CR 43(k); WPI 1.01.

<sup>3</sup> Dr. Hulse answered this question, stating their opinion that A.N. would contact "his victim." Ryder RP 151.

to his preoccupation with other things. Adebayo RP 130; Ryder RP 44-45. In support of this conclusion, she described A.N.'s acclimation to detention, use of Western State Hospital shelter, food, clothing, and medical attention while detained, and obedience to hospital meal and laundry schedules. Adebayo RP 130; Ryder RP 44-45. Dr. Hulse stated that the hospital meets A.N.'s safety needs because it provides him with medical care and nutrition. Ryder RP 130-31. But Dr. Hulse did not say those needs were not met outside the hospital. Ryder RP 130-31.

No witness testified that A.N. could not provide shelter, food, clothing, and medical care for himself outside the hospital. Dr. Hulse testified that although A.N. had not "expressed interest in" a specific plan of where to live upon release, he had previously demonstrated an ability to provide himself housing,

living in a “one-room rental with a relative.” Ryder RP 123. A.N. testified that it is “his business” where he wants to live but that he would take care of providing shelter for himself if released. Ryder RP 156.

A.N. also typically eats and sleeps well in the hospital, does laundry, and keeps himself clean. Adebayo RP 125; Ryder RP 45. A.N. testified that he “absolutely” can feed himself and care for his hygiene. Ryder RP 156. Dr. Hulse agreed, stating: “I think he’s [sic] probably quite able to figure out where to [sic] obtain his next food.” Ryder RP 124.

A.N. has numerous pre-existing health conditions requiring medical care but was generally “doing well” at the time of trial. Ryder RP 35-36. Dr. Zesiewicz explained A.N. stabilized one of those conditions, Grave’s disease, himself by voluntarily taking iodine replacement and “working closely” with his medical

doctor. Ryder RP 36. The government presented no evidence that A.N. ever failed to obtain shelter, food, clothing, or medical care for himself outside of the hospital.

Government witnesses did not describe any clear benefits to A.N.'s health or safety from detention at Western State Hospital. Dr. Hulse explained that "limited treatments" exist for A.N.'s diagnosis of "delusional disorder." Ryder RP 132. Instead, the hospital's sole treatment of A.N. consisted of supportive therapy. Ryder RP 132, 136-37. This therapy involved Dr. Hulse reading a memoir to A.N.—an older Vietnamese man without schizophrenia—about a young American woman with schizophrenia and asking him to relate to its content. Ryder RP 98-99, 136.

**4. The jury found A.N. gravely disabled, but the basis for the verdict remains unclear.**

The jurors received a verdict form that asked them to determine if “[A.N. is] gravely disabled as a result of his behavioral disorder.” CP 117. Jury Instruction 8 noted that “ten jurors must agree upon the answer.” CP 116. The jury also received Jury Instruction 6, which included the statutory language of both prongs of grave disability.<sup>4</sup> CP 113. The verdict form did not distinguish the prongs or require ten jurors to agree based on the same prong to find grave disability. CP 117.

The jury returned a verdict that found A.N. “gravely disabled” but did not specify which prong was

---

<sup>4</sup> Jury Instruction 6 added some language to the statutory definition of prong (b) and read: “is not receiving *or would not receive, if released*, such care as is essential[.]” *Compare* CP 113 (Jury Instruction 6) (emphasis added), *with* RCW 71.05.020(24)(b).

the basis for the verdict. CP 117. The court issued an order committing A.N. for up to 180 days at Western State Hospital. CP 119-20.

**5. A commissioner ordered A.N. forcibly medicated without considering potentially fatal side effects.**

A.N. has consistently refused antipsychotic drugs based partly on his concern about side effects, including the serious, possibly even fatal impacts on his pre-existing heart conditions. Kelly RP 21. At trial, Dr. Zesiewicz explained the complex nature of A.N.'s various health conditions and stated that, as a result, antipsychotics might not even "be an option." Ryder RP 34-36, 43-44. New drugs would require consultation between his psychiatrist and a medical doctor, along with an electrocardiogram to make this determination. Ryder RP 43-44.

Shortly after the trial, another psychiatrist, Michelle Hines, sought to forcibly medicate A.N. CP 121. She asserted a government interest in reducing the time A.N. would remain in detention “at increased public expense.” CP 124; *see also* CP 132.

At the hearing, Dr. Hines briefly noted A.N.’s concerns about side effects. Kelly RP 9-10. She discussed his multiple heart conditions, including atrial fibrillation and a history of heart failure from a gastrointestinal bleed. Kelly RP 9-10, 15. A.N. has consistently taken medications and obeyed appropriate medical advice to care for these conditions. Kelly RP 9-10, 15, 21. When A.N. testified, he expressed fear of how antipsychotics might impact his heart, including that he might “[bleed] to death” as he nearly had in 2016 from a severe gastrointestinal bleed resulting in heart failure. Kelly RP 15-16, 21.

Dr. Hines dismissed his concerns and the risks to his heart, despite her lack of expertise in cardiology. Kelly RP 4-5, 10-11. Dr. Hines suggested A.N. would be protected by the constant monitoring while in the hospital. Kelly RP 10. The government's stated interest in forcible medication was to speed A.N.'s release, even though Dr. Hines believes that A.N. would not take antipsychotic drugs if released. Kelly RP 11; CP 124.

A.N. met with his cardiologist over a week before the hearing, but they did not discuss the risks of antipsychotics to his heart. Kelly RP 10-11, 16. The cardiologist recommended an echocardiogram, which A.N. had not received before the hearing. Kelly RP 11. Dr. Hines said that the hospital would "arrange for that test" but did not say this would occur before the hospital forcibly medicated A.N. Kelly RP 11. Dr. Hines discussed the importance of considering the "risks and

benefits,” including “cardiac side effects” of the drugs.

Kelly RP 10. Still, she did not explain the risks or how they factored into her recommendations. Kelly RP 10.

A.N.’s attorney asked for dismissal of the motion for involuntary treatment to allow A.N. the opportunity to follow up with his cardiologist about the drugs so that he could make an informed decision. Kelly RP 23. His attorney noted the lack of urgency to medicate, given no evidence that A.N. presented as a danger to himself or others. Kelly RP 23.

The commissioner issued a written order with a “substituted judgment” finding allowing forcible medication. Kelly RP 24-27; CP 130; RCW 71.05.217(1)(j)(ii)(C). The relevant findings of fact in the order focused only on A.N.’s lack of religious exemption and hearsay evidence about A.N.’s family’s

views which the commissioner had excluded as evidence during the hearing. CP 131-33.

#### E. ARGUMENT

##### **1. The government did not sufficiently prove that A.N. was gravely disabled.**

Involuntary commitment is “a massive curtailment of liberty.” *In re Det. of LaBelle*, 107 Wn.2d 196, 204, 728 P.2d 138 (1986) (citing *In re Det. of Harris*, 98 Wn.2d 276, 283, 654 P.2d 109 (1982)). The legislature has recognized this interest by including among the primary purposes of the involuntary treatment act “[t]o safeguard individual rights” and “[t]o prevent inappropriate, indefinite commitment[.]” RCW 71.05.010(1). The Involuntary Treatment Act must be strictly construed to avoid erroneous deprivation of liberty. *In re Det. of Swanson*, 115 Wn.2d 21, 28, 804 P.2d 1 (1990).

The government may not constitutionally detain a person based on mental illness alone. *LaBelle*, 107 Wn.2d at 201. Instead, it must prove by clear, cogent, and convincing evidence a potential for harm “great enough to justify such a massive curtailment of liberty.” *Id.* at 204, 209 (internal quotation marks omitted) (citing *Harris*, 98 Wn.2d at 283); RCW 71.05.310.

Washington allows 180-day involuntary commitment petitions on several bases, including if a person “present[s] a substantial likelihood of repeating acts similar to the charged criminal behavior” or if they are “gravely disabled.” RCW 71.05.320(4)(c)-(d). In this case, the government sought 180 days of involuntary commitment of A.N. *solely* based on grave disability. Adebayo RP 5; CP 60. A verdict based on evidence supporting an alternative basis of commitment which

is insufficient to support a finding of grave disability, would therefore violate due process. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948); *In re Det. of Cross*, 99 Wn.2d 373, 383-84, 662 P.2d 828 (1983).

The “gravely disabled” basis for involuntary commitment serves the government’s interest in protecting people from harming themselves. *In re Det. of McLaughlin*, 100 Wn.2d 832, 839, 676 P.2d 444 (1984); RCW 71.05.010(1)(a). Prong (a) does so by allowing the commitment of people who, as a result of their mental illness, would not provide for their own essential needs if released and would passively cause themselves serious physical harm. *LaBelle*, 107 Wn.2d at 204.

RCW 71.05.020(24) defines this as “a condition in which a person, as a result of a behavioral health disorder[:.]”

(a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety[.]

Alternatively, prong (b) permits detention of people who would decompensate if released and place themselves in situations that create the danger of serious physical harm to themselves, defined as:

(b) manifest[ing] severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

Prongs (a) and (b) of this definition are distinct.

At least one must be proven by clear, cogent, and convincing evidence to find a person gravely disabled.

*LaBelle*, 107 Wn.2d at 209; RCW 71.05.310. The Court requires “recent, tangible evidence” of a health or

safety risk to prevent an unconstitutionally broad construction of these prongs. *LaBelle*, 107 Wn.2d at 201, 204-05. Here, the government did not meet its burden as to either prong.

- a. The government did not prove A.N. would be unable to provide for his “essential needs.”

The evidence necessary to prove prong (a) of grave disability must show danger arising from “passive behavior—i.e., the failure or inability to provide for one’s essential needs.” *LaBelle*, 107 Wn.2d at 204. The Court defined essential needs as “food, clothing, shelter, and medical treatment.” *Id.* at 205. Failure to provide an essential need must also “[present] a high probability of serious physical harm within the near future.” *Id.*

First, the government did not present evidence that A.N. would fail or be unable to feed himself if released. In *LaBelle*, the Court found insufficient

evidence that one appellant, Mr. Trueblood, would fail to feed himself despite a history of weight loss. 107 Wn.2d at 217. By comparison, A.N. had *no* history of not eating outside the hospital and, like Trueblood, was eating well at the hospital.<sup>5</sup> Adebayo RP 125; *id.* Dr. Hulse and A.N. testified to A.N.’s ability to maintain these habits on release. Ryder RP 124, 156.

---

<sup>5</sup> A.N. observed a hunger strike while in the hospital to protest and make change in a legal system he believes is unfair. Ryder RP 140. His hunger strike concluded when he was hospitalized for renourishment. Ryder RP 127. In *LaBelle*, appellant Richardson did not eat well, but since “there was no evidence he was in any danger therefrom” the Court found the risk of physical harm too speculative and insubstantial to justify continuing commitment. 107 Wn.2d at 214. Dr. Hulse testified that A.N. was not harmed as a result of his hunger strike, making any risk of serious harm similarly speculative and insubstantial. Ryder RP 127; *id.* Dr. Hulse explained A.N. never believed he would die and knew the hospital would feed him. Ryder RP 126. Since his hunger strike he had been eating well, providing evidence of *ability* to provide food for himself. Adebayo RP 125; *see LaBelle*, 107 Wn.2d at 217. The government put forth no contrary evidence to suggest hunger strikes would be repeated outside the hospital.

Second, the government did not present evidence A.N. could not clothe himself. In *In re Det. of R.H.*, evidence that an unhoused man failed to find adequate clothing for himself during cold weather months provided a basis for finding him gravely disabled. 178 Wn. App 941, 947, 316 P.3d 535 (2014). By contrast, A.N. did his laundry at Western State Hospital and generally appearing well-dressed. Adebayo RP 125; Ryder RP 45.

Third, the government did not provide sufficient factual evidence to show that A.N. would fail or be unable to provide shelter for himself. “Uncertainty of living arrangements or lack of financial resources will not alone justify continued confinement in a mental hospital.” *LaBelle*, 107 Wn.2d at 210. In contrast to the *LaBelle* lead petitioner’s history of living unhoused, A.N. previously lived with a relative. *Id.*; Ryder RP

123. In addition, A.N.'s potential uncertainty<sup>6</sup> about where he would live upon release differs from Mr. LaBelle's plan to live on the streets. *LaBelle*, 107 Wn.2d at 210. Thus, unlike in *LaBelle*, the government did not offer a factual basis for finding A.N. unable to care for his essential need for shelter. *See id.*

Fourth, the government did not sufficiently prove that A.N. would not provide for his physical medical healthcare. *See LaBelle*, 107 Wn.2d at 204-05. In *In re Det. of A.F.*, evidence that a man could not physically care for himself and would not seek appropriate medical care supported a finding of grave disability. 20 Wn. App. 2d 115, 127, 498 P.3d 1006 (2021). By comparison, A.N. has demonstrated his ability to

---

<sup>6</sup> A.N. testified that he simply felt his plan for living arrangements was "his business" but that he would provide shelter for himself. Ryder RP 156.

manage his health conditions by voluntarily taking medications and working with his doctor. Ryder RP 36.

The primary evidence offered by the government regarding A.N.'s health or safety involved speculation about future interactions with law enforcement and a return to jail. Ryder RP 48-49, 121-22. However, the danger "inherent in any hostile confrontation.... is not the kind of danger contemplated [by the statute].... from [] failure to provide for such essential needs as food, clothing and shelter." *LaBelle*, 107 Wn.2d at 212. While this evidence may support a different basis for an involuntary commitment, such as "likelihood of serious harm to others," it does not support a finding of grave disability.<sup>7</sup> *Id.*

---

<sup>7</sup> Dr. Hulse shared a similar understanding of such evidence, describing possible violation of a no contact order as posing a "danger to others" rather than "danger to self." Ryder RP 121-22.

The government's witnesses also made unsupported, conclusory statements that A.N. posed a risk to his health and safety. Ryder RP 44-45, 123-24. These statements lacked factual support and did not rise to the level of "recent, tangible evidence." *See LaBelle*, 107 Wn.2d at 204-05. As a result, the government did not meet its burden of proving by clear, cogent, and convincing evidence that A.N. would fail to provide for his "essential human needs of health or safety." *See id.* at 209; RCW 71.05.020(24).

- b. The government did not sufficiently prove A.N. would not receive care essential to his health or safety if released to the community.

"[M]ental illness alone is not a constitutionally adequate basis for involuntary commitment." *LaBelle*, 107 Wn.2d at 201 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)). The first part of prong (b), "manifest[ing] severe

deterioration in routine functioning” through “loss of cognitive or volitional control,” without something more, would violate that constitutional mandate. RCW 71.05.020(24)(b); *LaBelle*, 107 Wn.2d at 201. An analysis of prong (b) must therefore also focus on the second element: whether the respondent is “receiving such care as is essential for his [] health or safety.” RCW 71.05.020(24)(b).

This element involves the necessity of involuntary treatment (“care as is essential”) and the risk of harm to the individual (“health or safety”). RCW 71.05.020(24)(b). The government must show “the harmful consequences likely to follow” absent involuntary treatment and that detention is “essential,” not merely preferred, beneficial, or in the individual’s best interests. *LaBelle*, 107 Wn.2d at 208. Like in prong (a), the phrase “health or safety” in prong

(b) relates to “serious physical” harmful consequences. *See id.* at 205; *In re Det. of D.W.*, 6 Wn. App. 2d 751, 759-760, 431 P.3d 1035 (2018).

A verdict of grave disability, therefore, requires a showing by clear, cogent, and convincing evidence that an individual: (1) is decompensating; (2) that the decompensation creates a high probability of serious physical harm to that person; and (3) that involuntary treatment is “essential” to prevent that harm. The government has not met its burden in proving (2) and (3).

*i. The government failed to show a high probability that A.M.’s release would result in serious physical harm.*

Medical terminology in prong (b) creates the danger of excessive deference to the opinions of mental health professionals. *LaBelle*, 107 Wn.2d at 207-08. Requiring sufficient “factual basis” ensures the

government does not detain people solely based on the insulated conclusions of those seeking their involuntary commitment. *Id.*

Conclusory statements or speculation about future interactions with law enforcement do not meet *LaBelle*'s "factual basis" standard. 107 Wn.2d at 208; Adebayo RP 130; Ryder RP 44-45, 48-49, 122-24. Just as with prong (a), the danger "inherent in any hostile confrontation.... is not the kind of danger contemplated" by the statute. *LaBelle*, 107 Wn.2d at 212. Interactions with law enforcement or being sent to jail alone do not provide a sufficient risk of "serious physical harm" to meet the prong (b) definition of grave disability. The government cannot use the danger present in its own jails to justify detaining them in a different state institution. *See* Ryder RP 48-49.

ii. *The government did not sufficiently prove commitment at Western State Hospital was essential to prevent serious physical harm.*

The government offered no evidence to show that involuntary treatment was *essential*—rather than merely preferred, beneficial, or in A.N.’s best interests—to prevent serious physical harm. *See LaBelle*, 107 Wn.2d at 208. Absent sufficient proof of risk of serious physical harm, the government cannot prove detention to prevent such harm is essential.

The government provided no factual basis for finding hospital detention essential to A.N.’s health or safety, focusing instead on his “best interest.” *Ryder* RP 131. And it is contestable whether treatment was even in A.N.’s best interest; Western State Hospital could only offer “limited treatment” for A.N.’s “delusional disorder.” *Ryder* RP 98-99, 132, 136-37.

- c. The commitment order should be reversed for insufficient evidence.

The government did not offer sufficient evidence that if released, A.N. would be unable to provide for his essential needs or would create a risk of serious physical harm to himself that made involuntary commitment essential. The government failed to meet its burden in proving A.N. was gravely disabled and the order for commitment should be reversed.

**2. Not requiring the jury to agree on the basis for finding A.N. gravely disabled violated A.N.'s procedural due process rights.**

Involuntary commitment is a “significant deprivation of liberty which the State cannot accomplish without due process of law.” *LaBelle*, 107 Wn.2d at 201. Due process requires at least ten out of twelve jurors to agree on each part of an involuntary commitment verdict. *McLaughlin*, 100 Wn.2d at 845; *see also* RCW 4.44.380; CR 49(l) (requiring the same).

This protection has particular importance in involuntary commitment cases where a “massive curtailment of liberty” is at stake. *See LaBelle*, 107 Wn.2d at 201 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)).

In addition, the highly stigmatized majority view of prior commitments and mental illness make such procedural protection critical. Jury decisions by a ten-person majority, like the unanimity required in criminal cases, help to ensure the representation of minority views. James Kachmar, *Silencing the Minority: Permitting NonUnanimous Jury Verdicts in Criminal Trials*, 28 Pac. L.J. 273 (1996); *State v. Lamar*, 180 Wn.2d 576, 584, 327 P.3d 46 (2014). The Court in *LaBelle* noted both the “adverse social consequences” of involuntary commitment and the risk of imposing “majoritarian values” in commitment

cases. 107 Wn.2d at 204, 221. The U.S. Supreme Court has also acknowledged the indisputable stigma of commitment. *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The Washington Supreme Court explained that these “irrational fears of mental illness” create a necessity for protection against abuse of involuntary commitment. *Harris*, 98 Wn.2d at 281. One way to ensure such protection is by “imposing procedural safeguards.” *Id.* By not requiring at least ten jury members to make the finding of grave disability under the same prong, the court violated A.N.’s procedural due process rights. Because this is a manifest constitutional error, A.N. may raise it for the first time on appeal. RAP 2.5(a).

A.N. was entitled to complete due process protection in a trial that resulted in significant loss of liberty. *See LaBelle*, 107 Wn.2d at 201. A lack of

procedural protection permitted as few as five jurors to agree on each basis for finding A.N. gravely disabled. For example, five jurors could have supported a grave disability finding solely on prong (a) and five solely on prong (b) in violation of RCW 4.44.380's guarantee of a verdict by ten jurors. *McLaughlin*, 100 Wn.2d at 845.

- a. The massive liberty interest impacted by involuntary commitment creates a need for additional due process protections.

This Court should apply the *Mathews* balancing test to determine whether the failure to distinguish between the prongs of grave disability violated A.N.'s procedural due process rights. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The test requires courts to balance three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of

additional or substitute procedural safeguards; and (3) the government's interest, including the burden that an additional or substitute procedural requirement would entail. *Harris*, 98 Wn.2d at 285; *Mathews*, 424 U.S. at 335.

The Washington Supreme Court has repeatedly recognized the significant private liberty interest at stake in involuntary commitments. *LaBelle*, 107 Wn.2d at 221 (citing *McLaughlin*, 100 Wn.2d at 838-39; *Harris*, 98 Wn.2d at 279-80). In *Addington*, the U.S. Supreme Court similarly found the “weight and gravity” of an individual liberty interest in involuntary commitment cases required more due process protections than in typical civil cases. 441 U.S. at 424-25. Courts have also noted the added interest in avoiding involuntary commitment due to the associated “adverse social consequences.” *E.g.*, *LaBelle*, 107 Wn.2d

at 221; *id.* at 426.

The additional procedure will prevent erroneous violations of this liberty interest by preventing verdicts in which as few as five jurors support finding grave disability under each prong. The constitution and RCW 71.05.310 require proof by clear, cogent, and convincing evidence of grave disability findings. *LaBelle*, 107 Wn.2d at 209. Absent procedures requiring jurors to agree on the same prong, a person may be found gravely disabled without the government meeting their constitutionally required burden under either prong. This process suppresses minority views on either prong and allows for erroneous deprivations of liberty. *Lamar*, 180 Wn.2d at 584; *Kachmar, supra*.

Requiring the government to meet their burden of proof for at least ten jurors would add a limited burden to their interests if any. The government's interest is in

protecting those with serious mental illness from harming themselves if released. *McLaughlin*, 100 Wn.2d at 839; *LaBelle*, 107 Wn.2d at 201; RCW 71.05.010(1)(a). However, the government also has an interest under the Involuntary Treatment Act in “safeguard[ing] individual rights.” RCW 71.05.010(3). Here, the government sought to prove both prongs of grave disability to the jury, so their argument would remain identical regardless of the basis on which the jury relied. *Ryder* RP 192. Although convincing sufficient jurors on the same basis may be moderately more difficult, the significant liberty interest at stake weighs in favor of strong due process protections. *LaBelle*, 107 Wn.2d at 201; *Addington*, 441 U.S. at 424-25.

- b. Not providing a *Petrich*-like instruction or special verdict form violated A.N.'s procedural due process rights.

A *Petrich*-like instruction or modification of the verdict form could have easily remedied the procedural due process violation. The *Petrich* Court required a jury instruction that a unanimous verdict must be made based on the same underlying criminal act or acts. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). *Petrich* applies where, as here, “it would be impossible to know that either offense was proved to the satisfaction of all of the jurors” under the required standard. *Id.* at 570, 572 (quoting *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911)).

The Washington Supreme Court in *In re Det. of Halgren* held that unanimity rules apply to RCW 71.09 involuntary commitment cases. 156 Wn.2d 795, 809, 132 P.3d 714 (2006). *Petrich* instructions arise from one

such unanimity rule. Since the ten-juror majority requirement protects similar “due process concern[s]” in 71.05 involuntary commitments to those protected by the unanimity required in criminal and 71.09 involuntary commitments, a *Petrich*-like procedural protection was required here. *See McLaughlin*, 100 Wn.2d at 838, 845.

At least ten jurors must agree to each element of a verdict in a 180-day involuntary commitment jury trial. RCW 4.44.380; CR 49(l); *McLaughlin*, 100 Wn.2d at 845. Here, the jurors were not required by the court to do so in their verdict on grave disability. CP 117. The trial court should have required at least ten jurors find grave disability based on the same prong using a *Petrich*-like instruction or special verdict form. Since the trial court did not do so, this Court should reverse.

**3. The commissioner did not make the substantive “substituted judgment” required to medicate A.N. involuntarily.**

The legislature recognized the significant liberty interest at stake in forced medication hearings by creating a right for involuntarily detained people to refuse antipsychotic drugs except in limited circumstances. RCW 71.05.217(1)(j); RCW 71.05.215. This liberty interest gives people subject to involuntary medication related procedural due process rights. *Riggins v. Nevada*, 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992); *In re Det. of L.K.*, 14 Wn. App. 2d 542, 547-48, 471 P.3d 975 (2020). As a result, the legislature provided a procedural framework to limit this infringement on personal liberty strictly. RCW 71.05.217(1)(j); RCW 71.05.215. The framework includes a burden on the government to prove three factors by clear, cogent, and convincing evidence;

procedural protections for the respondent at the hearing; and a requirement for the court to make “specific findings of fact.” RCW 71.05.217(1)(j)(i)-(iii).

One required finding concerns “the person’s desires regarding the proposed treatment.” RCW 71.05.217(1)(j)(ii)(C). However, if the court deems a person “unable to make a rational and informed decision,” the court “shall make a substituted judgment for [the person] as if [they] were competent to make such a determination.” *Id.*

The order permitting the involuntary medication of A.N. included a “substituted judgment” section. CP 132. However, the finding lacked a substantive discussion and consideration of A.N.’s rational concerns concerning his health conditions. CP 132-33. It did not meet the standard for a “specific finding[] of fact” as demanded by the statute. *See* RCW 71.05.217(1)(j). As

a result, the court deprived A.N. of procedural due process protections intended by the legislature's statutory framework in RCW 71.05.217(1)(j).

- a. A.N. had a due process right to a “medical appropriateness” finding.

The Due Process Clause protects A.N.'s liberty interest against forced medication. *See Riggins*, 504 U.S. at 134; *L.K.*, 14 Wn. App. 2d at 547-48. When the government wishes to force a person to take an antipsychotic drug, it must prove an overriding justification and the “medical appropriateness” of that drug. *Riggins*, 504 U.S. at 135.

In *Riggins*, the U.S. Supreme Court required a finding of medical appropriateness before forcibly medicating a person to restore them to competency for trial. 504 U.S. at 135. The Court relied on its prior conclusion in *Washington v. Harper*, which allowed involuntary treatment of a person in jail with

antipsychotic drugs only after findings that the person posed a danger to themselves or others and the drugs were “in [their] medical interest.” *Id.* (citing *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990)). The liberty interest of involuntarily committed people requires similar due process protection. *L.K.*, 14 Wn. App. 2d at 548. This Court in *L.K.* found “[t]he due process clause . . . requires procedural safeguards to ensure a person’s interests are taken into account before authorizing involuntary medication.” *Id.* at 548.

Due process, therefore, requires a finding of medical appropriateness before ordering forced medication of an involuntarily committed person. The U.S. Supreme Court defined a “medically appropriate” drug as “in the patient’s best medical interest in light of his medical condition.” *Sell v. U.S.*, 539 U.S. 166,

181, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). This requires considering the possible side effects of specific drugs, including side effects related to A.N.'s heart and other health issues. *Id.*; Kelly RP 9-10.

As A.N. explained, the side effects of antipsychotics for him could be severe or even fatal. Kelly RP 21. Both Dr. Hines and significant scientific research confirm the rationality of A.N.'s fears based on the documented severe and fatal side effects of antipsychotics, particularly for people with heart conditions. Kelly RP 10. Antipsychotics combined with cardiovascular medications may aggravate cardiovascular side effects. Fadi T. Khasawneh & Gollapudi S. Shankar, *Minimizing Cardiovascular Adverse Effects of Atypical Antipsychotic Drugs in Patients with Schizophrenia*, Cardiology Research and

Practice at 3 (2014).<sup>8</sup> Regardless of whether a person takes heart medications, antipsychotics have many serious side effects and “could increase the risk of sudden cardiac death.” Matisyahu Shulman et al., *Managing Cardiovascular Disease Risk in Patients Treated with Antipsychotics*, J. of Multidisciplinary Healthcare 489, 490 (2014)<sup>9</sup>; Giuseppe Marano et al., *Cardiological Side Effects of Psychotropic Drugs*, 8(4) J. of Geriatric Cardiology 243, 245 (2011).<sup>10</sup> Even for people without heart conditions, the U.S. Supreme Court has recognized that antipsychotics “can have serious, even fatal, side effects.” *Riggins*, 504 U.S. at

---

<sup>8</sup> Available at <https://tinyurl.com/5n88kdez>.

<sup>9</sup> Available at <https://tinyurl.com/5h8dv4m9>.

<sup>10</sup> Available at [tinyurl.com/5aeuwrjv](https://tinyurl.com/5aeuwrjv). The specific drugs recommended by Dr. Hines reflect the trend of documented severe and fatal side effects. A 2014 study found negative cardiovascular side effects from Paliperidone and Risperidone, including that “[Risperidone] could provoke sudden death.” Khasawneh, *supra* at 2 (Table 1).

134.

Washington courts have recognized side effects as a key element of medical appropriateness findings in the context of competency restoration. *State v. Lyons*, 199 Wn. App. 235, 241, 399 P.3d 557 (2017); *State v. Mosteller*, 162 Wn. App. 418, 428-29, 254 P.3d 201 (2011). One case found that denying expert medical testimony to dispute or raise “the severity of the medication’s side effects” could violate procedural due process. *Lyons*, 199 Wn. App. at 241. A.N.’s attorney in closing sought dismissal so that A.N. could seek access to expert medical advice from his cardiologist. Kelly RP 23. Unlike in another Washington case, *Mosteller*, it was clear A.N. refused the drugs and severe side effects were a risk, so the due process requirements from *Riggins* and *Harper* apply. 162 Wn. App. at 428-29. A

medical appropriateness finding was constitutionally required. *See Harper*, 494 U.S. at 227.

Dr. Hines's recommendation does not meet the procedural due process requirement for a finding of medical appropriateness. In *Harper*, the Court found that psychiatrists could make the finding of medical best interest instead of a court. However, this was predicated on "fair procedural mechanisms" underlying the finding. *Harper*, 494 U.S. at 231. The Court held that a standard for involuntary medication "cannot withstand challenge if there are no procedural safeguards to ensure the [person's] interests are taken into account." *Id.* at 233. The procedure in *Harper* allowed forced medication based on a determination by a psychiatrist, psychologist, and the Center superintendent, none of whom were currently treating Mr. Harper. *Id.* at 229.

By comparison, Dr. Hines had none of the “independence of the decisionmaker” noted as essential in *Harper*, since she brought the petition to medicate and was still treating A.N. at the time of the hearing. Kelly RP 6; CP 121; *Harper*, 494 U.S. at 233. Dr. Hines also did not undertake the “degree of care” in seeking to medicate A.N. described by another hospital psychiatrist at trial. Ryder RP 43-44; *see Harper*, 494 U.S. at 233. Before the hearing, she had not met with A.N.’s cardiologist about the drugs or ensured that A.N. got the recommended echocardiogram after his most recent appointment.<sup>11</sup> Kelly RP 10-11, 16.

---

<sup>11</sup> This lack of consideration of A.N.’s pre-existing conditions goes against medical best practices. One medical journal article explained best practices involve “[c]ommunication between mental health and medical care providers . . . throughout the treatment process” including weighing the individual’s medical risk factors against the benefits of a drug. Shulman, *supra*. Another stated that “patients with pre-existing cardiovascular disease should be carefully evaluated

Since Dr. Hines could not make the medical appropriateness finding, the commissioner at the hearing should have ensured the protection of A.N.'s due process rights by making the finding himself.

RCW 71.05.217(1)(j)(ii)(C) offers a procedure through which the commissioner could have made the required finding. The legislature revised RCW 71.05.215—which gives an involuntarily committed person a right to refuse antipsychotic drugs—following *Harper. L.K.*, 14 Wn. App. 2d at 549. RCW 71.05.217(1)(j) provides the procedural protections for that right and should be read as ensuring the procedural due process protections required by *Harper*. *See id.*; *Harper*, 494 U.S. at 233. A substituted

---

before they begin any antipsychotic treatment.” Marano, *supra*. A third noted that “many health care practitioners do not appreciate the significance of the cardiovascular side effects that may be associated with” use of antipsychotics. Khasawneh, *supra* at 2.

judgment finding requires courts to place themselves in the shoes of the person the government is forcing to take medication and weigh the risks against the benefits, essentially determining medical best interest. *See In re Guardianship of Ingram*, 102 Wn.2d 827, 842, 689 P.2d 1363 (1984). The commissioner violated A.N.'s procedural due process rights by not making a substantive finding regarding medical appropriateness.

- b. The commissioner's substituted judgment finding was inadequate.

The severe, dangerous side effects of antipsychotics should not be taken lightly by courts ordering forced medication. Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 San Diego L. Rev. 161, 183-188 (2009). Many critics, including medical professionals and people living with mental illness, recognize that antipsychotics may not

be the best or right option for all people living with mental illness. Daniel Bergner, *Doctors Gave Her Antipsychotics. She Decided to Live with Her Voices*, N.Y. TIMES, May 17, 2022.

The Washington legislature allows courts to weigh factors a rational person would consider when deciding on whether to take a new drug. RCW 71.05.217(1)(j)(ii)(C). In delineating “specific findings of fact” required from courts to order involuntary medication, the legislature indicates a clear expectation of a substantive consideration of each finding. *Id.*

- i. Substituted judgments must analyze the risks to and desires of the person subject to forced medication.*

Substituted judgments require a substantive evaluation of factors a person would consider if able to make their own “rational and informed” medical

decisions. RCW 71.05.217(1)(j)(ii)(C). The *Ingram* standard requires a court, when making medical decisions for an incompetent person, to “attempt to decide as that individual would if competent.” *In re Det. of Schuoler*, 106 Wn.2d 500, 506, 723 P.2d 1103 (1986) (citing *Ingram*, 102 Wn.2d 827). Such an evaluation must involve consideration of “all relevant factors” including “the risk of adverse side effects from the proposed treatments.” *Ingram*, 102 Wn.2d at 840. In addition, “the ward’s expressed wishes must be given substantial weight, even if made while the ward is incompetent.” *Id.* “[T]he mere fact that an individual is mentally ill does not also mean that the person so affected is incapable of making a rational choice with respect to his .... need for treatment.” *LaBelle*, 107 Wn.2d at 208. The logic that a resistant patient, even if incompetent, would be unmotivated to engage in their

rehabilitation similarly applies here, where Dr. Hines noted A.N. would be unlikely to take daily doses if released. *See Ingram*, 102 Wn.2d at 840; Kelly RP 11.

Ultimately, the *Ingram* standard requires courts to engage in a substantive balancing of all the benefits and drawbacks of a course of treatment and make decisions as close as possible to those of a “rational and informed” patient. *Ingram*, 102 Wn.2d at 842. In *Schuoler*, the Court applied the *Ingram* standard to a substituted judgment for involuntary electroconvulsant therapy.<sup>12</sup> 106 Wn.2d at 506. The commissioner in A.N.’s case, like the Court in *Schuoler*, “failed to conduct the [necessary] investigation” for a substituted judgement required by law. *See id.* at 508.

---

<sup>12</sup> The same RCW requiring a substituted judgment finding for involuntary medication in A.N.’s case also applies to electroconvulsant therapy. RCW 71.05.217(1)(j).

The commissioner should have incorporated consideration of the risks to A.N.'s heart into the balancing test required under the *Ingram* standard for substituted judgment. *See Ingram*, 102 Wn.2d at 842. Instead the commissioner only referenced A.N.'s heart condition in an overview of hearing testimony without substantively weighing his concerns. CP 132. Like in *Schuoler*, the final order included no findings about A.N.'s desires, other than a brief review of testimony. CP 132; *Schuoler*, 106 Wn.2d at 508. The section of the order allocated to the substituted judgment makes no mention of the drugs' potential side effects. CP 131-33. Instead, as in *Schuoler*, the commissioner improperly discussed hearsay testimony about family member opinions.<sup>13</sup> 106 Wn.2d at 507-08; CP 133; Kelly RP 15.

---

<sup>13</sup> The commissioner in A.N.'s case sustained a hearsay objection regarding testimony that family members had told a social worker they wanted A.N. to receive

This Court should find, as the Court did in *Schuoler*, that this was not a sufficient substituted judgment finding. 106 Wn.2d at 508.

*ii. A substituted judgment requires the court to give informed consent on behalf of a person being involuntarily medicated.*

Due process also requires an attempt to gain informed consent from a patient before seeking involuntary medication. *L.K.*, 14 Wn. App. 2d at 550. The required finding about a person's desires regarding the drug helps to enforce this due process right. *Id.* at 551. Since a substituted judgment replaces that finding if the court deems a person "unable to make a rational and informed decision," it substitutes the court's

---

treatment. Kelly RP 15. Despite the sustained objection, the commissioner improperly incorporated this testimony into the order for involuntary medication. CP 133 (Order Authorizing Involuntary Treatment at 4:8).

informed consent for that of the person. RCW  
71.05.217(1)(j)(ii)(C).

Here, the information necessary for informed consent was unavailable at the hearing. Kelly RP 23. The order makes no note of the missing information, not even mentioning that A.N.'s cardiologist had recently recommended an echocardiogram which A.N. had not yet received. CP 130-33.; Kelly RP 11. The commissioner also left out that neither A.N. nor Dr. Hines had spoken with a cardiologist about how the drugs might impact A.N.'s heart conditions. CP 130-33; Kelly RP 11.

*iii. Substituted informed consent protects against excessive deference to the party filing to detain a person.*

The Washington Supreme Court has noted the risks of excessive deference to mental health professionals where significant liberty interests are at

stake. *LaBelle*, 107 Wn.2d at 207-08. Here, the commissioner accepted without discussion a psychiatrist's conclusory assertions that the possible benefits of drugs outweighed serious, possibly deadly cardiac risks. Kelly RP 9-11, 14, 25-26; CP 130-33. This deference is particularly concerning since Dr. Hines established no expertise in cardiology. Kelly RP 4-5. Instead, just as the court in *Schuoler* should have engaged in a substantive consideration of the desires of Ms. Schuoler's family, here the commissioner should have engaged in a substantive review of both the known and unknown risks to A.N.'s health. *See Schuoler*, 106 Wn.2d at 508.

- c. This Court should reverse the order to force-medicate A.N.

The lack of substantial consideration of A.N.'s rational concerns in the commissioner's substituted judgment violated RCW 71.05.217(1)(j)(ii)(C). A.N. was

entitled by law to a substantive weighing of the potentially life-and-death risk of the drugs against the government's asserted benefit of possible faster release. The commissioner erred by not providing the required level of consideration. The order for involuntary medication should be reversed.

#### F. CONCLUSION

This Court should reverse and remand for dismissal the trial court's order involuntarily committing A.N. for 180 days. The government did not sufficiently prove either prong of grave disability. Further, the court did not require the jury to decide grave disability on the same prong, violating A.N.'s due process rights.

This Court should also reverse and remand for dismissal of the commissioner's order of involuntary

medication after A.N.'s statutory right to a substantive substituted judgment finding was violated.

DATED this 1st day of August, 2022.

In compliance with RAP 18.17, this document contains 7,611 words.

Respectfully submitted,

/s/Kaya McRuer

Kaya McRuer

APR 9 Legal Intern (ID# 9894020)

Washington Appellate Project

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2710

E-mail: [kayamcruer@berkeley.edu](mailto:kayamcruer@berkeley.edu)

A handwritten signature in black ink, appearing to read 'Kate Benward', with a stylized flourish at the end.

Kate Benward (WSBA #43651)

Washington Appellate Project

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2710

E-mail: [katebenward@washapp.org](mailto:katebenward@washapp.org)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

---

IN RE DETENTION OF

A.N.,

Appellant.

)  
)  
)  
)  
)  
)  
)

NO. 56491-2-II

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF AUGUST, 2022, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AMANDA SMITLEY, AAG  
[Amanda.Smitley@atg.wa.gov]  
[shsappealnotification@atg.wa.gov]  
OFFICE OF THE ATTORNEY GENERAL  
PO BOX 40145  
OLYMPIA, WA 98504

( ) U.S. MAIL  
( ) HAND DELIVERY  
(X) E-SERVICE VIA PORTAL

[X] A.N.  
WESTERN STATE HOSPITAL  
9601 STEILACOOM BLVD SW  
TACOMA, WA 98498

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF AUGUST, 2022.



X \_\_\_\_\_

**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Telephone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

August 01, 2022 - 4:43 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 56491-2  
**Appellate Court Case Title:** Access to case information is limited  
**Superior Court Case Number:** 20-6-01577-6

### The following documents have been uploaded:

- 564912\_Briefs\_20220801164242D2239257\_0401.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.080122-09.pdf*

### A copy of the uploaded files will be sent to:

- Amanda.Smitley@atg.wa.gov
- shsappealnotification@ATG.WA.GOV
- vanessa.james@atg.wa.gov

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20220801164242D2239257**